92-1997

Supreme Court, U.S.
FILED
MAY 12 1993
OFFICE OF THE CLERK

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1992

WILFRED CARTER

Petitioner

V.

UNITED STATES

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Wilfred Carter
Pro-Per Counsel for Petitioner
10242 Darby Avenue #2
Inglewood, CA 90303
(310) 671-9700
PETITIONER

25 pp

QUESTION PRESENTED

Whether the United States Court of Appeals for the Ninth Circuit has the power and duty to set aside clearly erroneous judgements and orders secured based on false and perjured, misstatements of true facts, whereas Court records show. Personal services pursuant to F.R. Civ. P.4 and Proof of Service 58, 58.1, Hancock v. Pico (1860) 40 C.153 and Quivey v. Baker (1869) 37465, and Diamond National Corp. v. Golden Empire (18-963), 213 CA 2d 283, 28 Cal. Rptr.

TABLE OF CONTENTS

Pages

Question Presented i

Table of Contents ii

Table of Authorities iii

Opinions Below iv

Jurisdiction

Statement of the Case 6-7

REASONS FOR GRANTING WRIT OF CERTIORARI

Page

I. Entry of Default was Proper based on....6
Personal Service of Certified Grocers California, Ltd., by Registered Process Server.

II. Defendant Has Taken Advantage of Misstated Law and Facts.

III. Misleading Statements by Certified Grocers, California, Ltd., Apparently Misled Court into Accepting as Truth That Which Was False.

APPENDIX

1. Order, 9th Circuit of Appeals

TABLE OF AUTHORITIES

CASES Page(s)

1. Diamond Nat. Corp. v. Golden.....4
Empire Builder
(1963) 213, CA 2d 288, 28 Cal. Rptr. 616

2. Hancock v. Pico.....4
(1860) 40C 153

3. Ouivey v. Baker.....4
(1869) 37 C 465

4. Norman v. Berney.....4
(1965) 235 CA 2d 424,
45 CAL Rptr. 467

5. Fitzgerald v. Herzer.....4
(1947) 78 CA 2d 127,
177 P2d 364

7. Mitchell v. Jones.....4
(1959) 172 CA 2d 580,
342 P2d

8. Frees v. Salot.....4
(1954) 122 CA 2d 561 266,
P2d 140

CONSTITUTIONAL PROVISIONS:

14th Amendment.....6

SELECTED SECTIONS OF FEDERAL RULES

Federal Rules of Civil Procedure Rule 526
Federal Rule FRCP 55.....4

OTHER AUTHORITIES:

Local Rule 5.8.1
Local Rule 7.6.....4
Local Rule 14.10.....4

OPINIONS BELOW

This is an Appeal from judgement in favor of defendants/Appellees Certified Grocers of California, Ltd. Plaintiff Appellant, Wilfred Carter, filed its Complaint for Wrongful Termination (Job Discrimination), Aggrieved Conduct and Plaintiff suffered irremediable harm, deprivation of property, and upon complaint alleges sufficient facts in this cause of action. A Demand for a judgement for relief to which the pleader claims he is entitled to (Code 55).

Aggrieved Conduct by Certified Grocers of California, Ltd., action taken without justification, has imposed unequal burden on Plaintiff/Appellant which is unconstitutional under the equal protection doctrine, United States Constitution, 14th Amendment.

Plaintiff/Appellant Wilfred Carter contends that defendants' action was with intent to bring harm and damage to Plaintiff.

This lawsuit was filed, in this action by the Civil Code 52 and Federal Code and the

United States Constitution, 14th Amendment. In the alternative, Plaintiff/Appellant contends that there are disputed issues of material facts as to defendants' failure to answer or respond to Complaint within the statute of limitations and their aggrieved conduct, and with it damages became irremediable.

JURISDICTION

This Court's jurisdiction to review the 9th Circuit Court of Appeals Order of

_____

is invoked pursuant to 28 U.S.C. 1257.

Constitutional Provisions, Statutes and Regulations:

1. Fourteenth Amendment, due process of law.
2. 28 U.S.C. 1257.
3. Selected Sections of Rules
   Federal Rules, 52
   Federal Rules, 55
   Federal Rule, Civ. P. 4(d)(3)
4. Statutes of Court Rules
   CCP 415.30
   Local Rule 7.6
   Local Rule 14.10
   Local Rule 5.1

STATEMENT OF THE CASE

Plaintiff's lawsuit arises out of his eleven (11) years of employment with Certified Grocers of California, Ltd., on the basis of allegation of violation of company rules.

It should be noted that Plaintiff was exonerated of such charges, was re-instated but the company refused to pay retroactive pay for time lost. There has been continual harassment by management since Plaintiff's return to work.

Plaintiff contends Defendant was properly served in compliance with Civil Code FRCP 4(J).

The Attorney of Record was not of record until after the Default Judgement was filed and granted on September 26, 1990 in favor of Plaintiff. Plaintiff further contends Certified Grocers of California, Ltd. deprived him of his rights guaranteed by the Constitution of the United States and the laws of the State of California. In addition Plaintiff is seeking relief and the Complaint as damages.

Plaintiff provided the Court documents to substantiate sufficient evidence for a cause of action in the Complaint. Notice of Motion of Opposition to Default Judgement. The Court denied the Motion.

Judgement was entered in favor of Defendant on March 8, 1993. Plaintiff filed a timely Notice of Appeal from Judgement April 26, 1993.

Plaintiff's lawsuit arises out of his employment with Defendants, Certified Grocers of California, Ltd. Plaintiff at all times mentioned he was a resident of Los Angeles, County of Los Angeles, citizen of the United States, and an employee of Certified Grocers of California, Ltd., as a "truck driver" for over a period of eleven (11) years.

Plaintiff/Appellant in Pro Per filed his Complaint against Defendant, Certified Grocers of California, Ltd. on July 27, 1990.

Certified Grocers of California, Ltd. was served by personal services pursuant to F.R.

Civ. P 4(d) and Hancock v. Pico (1860) 40 C 153 and Quivey v. Baker (1869) 37 C465, and Diamond National Corp. v. Golden Empire Builder (18=963) 213 CA 2d 283, 28 Cal. Rptr. 616 on August 14, 1990 at their place of business located at 2601 So. Eastern Avenue, Los Angeles, California, by a Registered Process Server.

The default was issued based on the sworn declaration of "Proof of Service" on August 1, 1990 at 10:27 a.m. of David Woodward, person authorized to accept services of process". A description of Woodward was included in the Court records as prepared by the Registered Process Server. Hancock v. Pico (1860) 40 C 153 and Quivey v. Baker (1869) 37 C 465. Woodward did nothing with the summons and Complaint, on September 10, 1990 document "Request for Judgement by Default".

Based on F.R.C.P. 55(a) and Local Rule 14.10 the entry of Default by the Clerk was proper, and the Court apparently overlooked or failed to see these supportive documents con-

tained in the file. The law firm of Rexon, Freedman, Klepetar & Hambleton, a Professional Corporation, Los Angeles, California, was not Attorney of Records until several months after the Default was granted.

Appellant Wilfred Carter, alleged that Defendant, Certified Grocers of California, Ltd., has misrepresented the facts and committed perjury (Mr. Woodward and others), as it went about persuading the District Court to set aside a Default Judgement secured by him against Certified Grocers of California, Ltd. for $3,000,000.00.

There are three basis presented in this Petition for Writ of Certiorari:

1. Whether a party should be allowed to benefit from misrepresentation, whether or not the misstatements were intentional.

2. Whether the Court erred in setting the Clerk entry of default against Appellee, Certified Grocers of California, Ltd.

3. Whether Appellee, Certified Grocers

of California, Ltd. intentionally and willfuly mis-stated the facts and thereby caused the Courts to mistakenly dismiss Plaintiff Carter's Complaint against Certified Grocers of California, Ltd.

Certified Grocers of California, Ltd. itself was served by Personal Service, Attorney Service.

The service was effective pursuant to FRCP 4(c) and California Code of Civil Procedure §415.10.

> "The decision of the trial judge should be set aside based not on an abuse of discretion but rather on a mistake of facts as to what was contained in the Court file United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948)."

Since the order setting aside default was based on a mistake of facts as to what was in the Court's own file, this order should be re-

versed along with the Order dismissing the lawsuit for failure to serve Defendant, Certified Grocers of California, Ltd., within the allowed time.

Plaintiff should be awarded costs based on the fact that Defendant, Certified Grocers of California, Ltd. willfully with intent, deceived the Court as to the factual basis to set aside default.

Respectfully submitted

Wilfred Carter

WILFRED CARTER
10242 Darby Avenue #2
Inglewood, CA 90303

APPENDIX

UNITED STATES CONSTITUTION, PROVISIONS, STATUTES AND REGULATIONS

FOURTEENTH Amendment: [N]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty, or property without due process of law.

FEDERAL STATUTES:

28 U.S.C. 1257: (a) Final judgements or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court by Writ of Certiorari… or where the validity of a statute of any state is drawn in question on the ground of its being repugnant to the Constitution, treaty, or laws of the United States… (b) For the purposes of a State "Includes the District, 9th Circuit Court of Appeals.

CALIFORNIA CODE OF CIVIL PROCEDURE §415.10

F.R.C.P. 4(c)(3) paragraph (3)

FRCP 4(d) paragraph (3)

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 91-55629 APRIL 26, 1993

CT/AG#: CV-90-3981-WDK

WILFRED CARTER,

Petitioner,

V.

CERTIFIED GROCERS CALIFORNIA LTD

Defendant - Appellant

APPEAL FROM tthe United States District Court for the Central District of California, Los Angeles.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States

District Court for the Central District of California, Los Angeles, and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is AFFIRMED.

Filed and entered 3/8/93

# # # # # # #

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 91-55629 APRIL 8, 1993

DC. NO.#: CV-90-3981-WDK

WILFRED CARTER,

Petitioner-Appellant

V.

CERTIFIED GROCERS CALIFORNIA LTD.;

ABE ABRAHAMIAN; GEORGE WHITMAN;

CLAY DEVILLIER,

Defendants- Appellees.

No. 91-55699

WILFRED CARTER,

Petitioner-Appellee,

V.

CERTIFIED GROCERS CALIFORNIA LTD.;

ABE ABRAHAMIAN; GEORGE WHITMAN;

CLAY DEVILLIER,

Defendant- Appellant.

Appeal from the United States District Court
for the Central District of California
William D. Keller, District Judge, Presiding

Submitted March 4, 1993**
Pasadena, California

Before: D.W. Nelson, Wiggins, and Leavy, Circuit Judges.

Wilfred Carter appeals pro se the district court's dismissal of his case pursuant to Fed. R. Civ. P. Rule 4(j). Certified Grocers of California, Ltd. cross-appeals the district court's denial of Rule 11 sanctions. We affirm the district court on both accounts.

1. BACKGROUND

Carter filed his complaint in the district court on July 27, 1990, claiming employment discrimination. He attempted to serve Certified Grocers soon therafter! In September,

1990, Carter requested and received entry of default against Certified Grocers. Certified Grocers moved to set aside the default, claiming the summons and complaint had not been properly served. On November 26, 1990, the district court granted Certified Grocers' motion.

Two and a half months later, Certified Grocers again asserted that it had not been properly served -- this time as part of a motion to dismiss pursuant to Fed. R. Civ. P. Rule 4(j), which requirs that the summons and complaint be served within 120 days of filing. Carter never filed an opposition to this motion. On April 30, 1991, the district court granted the motion and the case was dismissed. Carter timely appealed to this court.

II. SERVICE ON CERTIFIED GROCERS

We review the district court's factual determinations for clear error. In re. San Vicente Medical Partners Ltd, 962 F.2d 1402, 1405 (9th Cir.), cert. denied, 113 S.Ct. 210

(1992). In its November 26, 1990 order setting aside the default, the district court found that the attempted service by mail was defective because the required acknowledgement forms were missing, and that no other means of service had been attempted. Although there was conflicting evidence before the district court, we cannot say this factual determination was clearly erroneous.

III. CARTER'S APPEAL

As a preliminary matter, the decision to set aside the default is not properly before this court.2 However, we note that relief from entry of default was proper because of inadequate service of the summons and complaint.

We turn now to the dismissal of Carter's case. Dismissal under Rule 4(j) is reviewed for abuse of discretion. West Coast Theater Corp. v. Portland, 897 F.2d 1519, 1528 (9th Cir. 1990). Carter filed no opposition to Certified Grocer's motion to dismiss. In light of his failure to oppose, the district court

deemed Carter to have consented to the motion, as permitted by the Local Rules[3]. We cannot say the district court abused its discretion in granting Certified Grocers' unopposed motion.

Even if the district court's "deeming" of Carter's consent were improper, we would nevertheless have to affirm. When proper service is not made within 120 days, Rule 4(j) requires dismissal without prejudice unless the plaintiff shows good cause for the failure to serve. Fed. R. Civ. P. Rule 4(j); Wei v. Hawaii, 763 F.2d 370, 372 (9th Cir. 1985). In response to the motion to dismiss, Carter did not establish good cause for the failure to serve; in fact, he filed no opposition at all. Furthermore, Carter never attempted to perfect service after the issue was first raised, although he had more than two months in which to do so[4]. Since Carter did not show good cause for his failure to serve Certified Grocers within 120 days, dismissal under Rule 4(j) was appropriate.

IV. CERTIFIED GROCERS' CROSS-APPEAL

Certified Grocers cross-appeals the district court's denial of Rule 11 sanctions. We review the district court's decisions regarding Rule 11 sanctions for abuse of discretion. Cooter & Gell v. Hartmax Corp., 496 U.S. 384, 405 (1990). In denying sanctions in this case, the district court did not abuse its discretion in light of the fact that Carter appeared pro se.

AFFIRMED

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[1] Carter named three individuals and Certified Grocers (his employer) as defendants, asserting claims under 42 U.S.C. §§1981 and 1983 and under state law. The district court dismissed the state law claims sua sponte and later dismissed the three individual defendants from the action. This appeal relates only to those claims which remained.

[2] Carter does not raise this issue in his notice of appeal, nor does he argue the issue in his brief as filed; however Certified Grocers' brief addresses the issue at length. Presumably, this argument was raised in the version of the brief Carter first attempted to file, which was refused by the clerk because of errors in form.

Carter's notice of appeal refers only to the district court's order dated April 30, 1991. Neither the notice of appeal nor the April 30, 1991 order concerns the decision to set aside the default. Because Carter did not raise the issue in his notice of appeal, this court cannot review the order setting aside the default. Fed. R. App. P. Rule 3(c); Roberts v. College of the Desert, 870 F.2d 1411, 1418-1419 (9th Cir. 1989); Casella v. Webb, 883 F.2d 805, 807 n.2 (9th Cir. 1989).

[3] Local Rule 7.9 of the Central District of California says: "Papers not timely filed... may

be deemed by the Court consent to the granting or denial of the motion, as the case may be" (emphasis added).

[4]. Certified Grocers first asserted the defect in service on September 13, 1990, when it objected by special appearance to Carter's request for default judgment. The 120-day period permitted by Rule 4(j) did not expire until November 26, 1990.